LIBRARY

Office-Supreme Court, U.S.
FILED
MAR 31 196
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 831

CAMDEN TRUST COMPANY, PETITIONER

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY
AND
DELAWARE VALLEY NATIONAL BANK
OF DELAWARE TOWNSHIP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BERNARD G. SEGAL,
SAMUEL D. SLADE,
1719 Packard Building,
Philadelphia 2, Pennsylvania
Attorneys for Petitioner.

SCHNADER, HARRISON,
SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania
Of Counsel

MARCH 31, 1962

PRESS OF NATHAN SERVICES, INC WASHINGTON D C

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
1. National Bank Act	2
2. New Jersey Banking Act	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	9
1. Importance of the Question	9
2. The 1864 Statute	12
3. The 1933 Branching Legislation	14
4. "Affiliate" Banks	16
CONCLUSION	20

TABLE OF CASES CITED

	Page
Adams v. Nagle, 303 U.S. (1938)	9
Board of Governors v. Agnew, 329 U.S. 441 (1946)	9
Casey v. Galli, 94 U.S. 673 (1876)	8
Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770 (D.C.D.C., 1959), affirmed per curiam, 278 F. 2d 871 (C.A.D.C., 1960), petition for rehearing denied	8
Concord First National Bank v. Hawkins, 174 U.S. 364 (1899)	12, 16
First National Bank v. Missouri, 263 U.S. 640 (1924)	9, 13
Harmon v. Brucker, 355 U.S. 579 (1958)	9
Kennedy v. Gibson, 8 Wall. 498 (1869)	8
Marbury v. Madison, 1 Cranch 137, 165 (1803)	9
National Bank of Detroit v. Wayne Oakland Bank, 252 F. 2d 537 (C.A. 6, 1958), certiorari denied, 358 U.S. 830	8, 9

STATUTES AND AUTHORITIES CITED

	Page
Annual Report of the Comptroller of the Currency:	
1895	15
1896, pp. 103-105	15
1902, pp. 45-47	15
1915, pp. 33-34	15
1923, pp. 2-17	15
1924, p. 5	15
1929, p. 5	15
1931, p. 1	15
Banking Act of 1948 of the State of New Jersey, Section 1(2) (N.J.S.A. 17:9A-1(2))	3
Banking Act of 1948 of the State of New Jersey, Section 19 (N.J.S.A. 17:9A-19)	3
Board of Governors, Federal Reserve System, Banking Studies (1941 Ed.), p. 118	14
Branch Banks as Separate Entities 31 Colum. L. Rev. 975, 976-977 (1933)	17
Branch, Group and Chain Banking, 48 Harv. L.R. 659, 660-661, 663	16
Cartinhour, Branch Group and Chain Banking (1931), p. 59	17
Chapman, Concentration of Banking (1934), p. 741	17
Chapman and Westerfield, Branch Banking (1942), p. 319	17
68 Cong. Rec. 2166	14
68 Cong. Rec. 2169	14
68 Cong. Rec. 2171	14
68 Cong. Rec. 2172	14
68 Cong. Rec. 2173	14
68 Cong. Rec. 2174	14
68 Cong. Rec. 2175	14
68 Cong. Rec. 2176	14
68 Cong. Rec. 2178	14
68 Cong. Rec. 2180	14
68 Cong. Rec. 2182	14
68 Cong. Rec. 2184	14
68 Cong. Rec. 2188	14
68 Cong. Rec. 3652	13, 14
68 Cong. Rec. 3822	14
68 Cong. Rec. 3823	14
68 Cong. Rec. 3826	17
74 Cong. Rec. 9904	14
75 Cong. Rec. 1416	14
75 Cong. Rec. 2141	15
75 Cong. Rec. 9711	15
75 Cong. Rec. 9890	19
75 Cong. Rec. 9892	19
75 Cong. Rec. 9893	14
75 Cong. Rec. 9975	14
75 Cong. Rec. 9980	

STATUTES AND AUTHORITIES CITED (Continued)

	Page
75 Cong. Rec. 13002	15
76 Cong. Rec. 1449	15
76 Cong. Rec. 1997	15
76 Cong. Rec. 2079	15
76 Cong. Rec. 2080	15
76 Cong. Rec. 2090	15
76 Cong. Rec. 2205	15
76 Cong. Rec. 2206	15
77 Cong. Rec. 3726	16
Federal Rules of Civil Procedure, Rule 24(b)	7
1 Fletcher, Cyclopedia Corporations (Permanent Ed.), section 45, 1960 Cumulative Supplement	10
Hearings Before a Subcommittee of the Senate Committee on Banking and Currency, on S. 880, S. 2350 and H.R. 6227, 84th Cong., 1st Sess., p. 16	19
Hearing Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking (1930) 71st Cong., 2nd Sess., Vol. 1, pp. 6, 9, 15-18, 23, 27, 66-67	15, 17, 18
Lattin, Corporations, p. 75 (1959)	10
29 Op. A.G. 81	12
37 Op. A.G. 325 (1933)	16
37 Op. A.G. 329	14
S. Rept. 584, 72nd Cong. 1st Sess., Part II (minority views)	14, 15, 18
S. Rept. 77, 73rd Cong., 1st Sess., p. 11 (1933)	15, 16, 18
S. Rept. 84th Cong. 2nd Sess.	19
Stevens, Corporations, p. 96 (1949)	10
Westerfield, The Banking Act of 1933, 41 J. Pol. Econ., 721, 741 (1933)	17
12 U.S.C. 21	2, 7, 8, 12
12 U.S.C. 22	2, 7, 8, 12
12 U.S.C. 23	2, 7, 8, 12
12 U.S.C. 24	2, 7, 8, 12
12 U.S.C. 25	2, 7, 8
12 U.S.C. 26	2, 7, 8, 12
12 U.S.C. 27	2, 7, 8, 9, 10, 12, 16
12 U.S.C. 30	5
12 U.S.C. 36(c)	2, 8, 10, 14
12 U.S.C. 36(c)(1)	13
12 U.S.C. 36(c)(2)	2, 1, 6, 7, 10, 11, 16
12 U.S.C. 38	12
12 U.S.C. 161	18
12 U.S.C. 221a	17
12 U.S.C. 371(c)	18
12 U.S.C. 377	19
12 U.S.C. 481	19
12 U.S.C. 1841(a)(c)	19
12 U.S.C. 1842	19
28 U.S.C. 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

CAMDEN TRUST COMPANY, PETITIONER

v.

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY

AND

DELAWARE VALLEY NATIONAL BANK

OF DELAWARE TOWNSHIP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Camden Trust Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on January 18, 1962.

OPINIONS BELOW

The judgment of United States District Court for the District of Columbia (R. 107)[1] was entered without an opinion. The opinion of the Court of Appeals (App., *infra*, pp. 1a-9a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, p. 10a) was entered on January 18, 1962. A timely petition for rehearing *in banc* was denied by order dated February

[1] Except where otherwise indicated, the record references herein are to the Joint Appendix in the court below.

20, 1962 (App., *infra*, p. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 36 (c)(2)—the branch banking provision of the National Bank Act—required the Comptroller of the Currency to reject the application for the proposed "new" bank involved in this case on the ground that the application in substance and effect constituted an attempt to obtain a forbidden branch bank.

2. Whether 12 U.S.C. 21-27, the sections of the National Bank Act which empower the Comptroller of the Currency to authorize new national banks, create in the Comptroller an absolute discretion which can be exercised without reference to the provisions or policy of 12 U.S.C. 36(c)(2), the branch banking provisions of the National Bank Act.

3. Whether Congress has conferred authority upon the Comptroller of the Currency knowingly to charter "affiliate" banks.

STATUTES INVOLVED

1. National Bank Act

(a) 12 U.S.C. 36 provides, in pertinent part:

* * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: * * * (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

(b) 12 U.S.C. 27 provides:

"Certificate of Authority to Commence Banking.—If, upon a careful examination of the facts so

reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Chapter. (R.S. § 5169)."

2. New Jersey Banking Act

(a) Section 1(2) of The Banking Act of 1948 of the State of New Jersey (N.J.S.A. 17:9A-1(2)) provides:

"(2) 'banking institution' shall mean a bank, savings bank, and a national banking association having its principal office in this State;"

* * *

(b) Section 19 of The Banking Act of 1948 of the State of New Jersey (N.J.S.A. 17:9A-19) provides, in pertinent part:

* * *

"B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office. * * *

"(3) When each proposed branch will be established in a municipality in which no banking institution has its principal office or a branch office."

STATEMENT

Petitioner, a state banking institution, has operated an authorized branch in Delaware Township, New Jersey, since 1953; under the New Jersey Banking Act of 1948, no New Jersey bank could establish a branch in Delaware Township and, pursuant to 12 U.S.C. 36(c)(2), no national bank could establish a branch there.

At an extensive public hearing, held in 1953 on petitioner's application for its branch, the Haddonfield National Bank was the principal objector, asserting that the area involved was well within its own competitive territory; that its facilities were sufficient to meet all banking needs of the area, both at the time and in the future; and that its main purpose in opposing petitioner's application was to avoid competition (R. 80-82).

Since 1953, as Delaware Township has grown, available banking facilities have been expanded and improved; and a new bank, the Cherry Hill National Bank, has been located in the Township (R. 83).[2] Haddonfield National itself, during this period, has established a branch in Voorhees Township on the Delaware Township boundary, a branch in Haddonfield, a branch in Collingswood also adjacent to and serving Delaware Township, and has pending before the Comptroller an application for authority to establish a branch in the neighboring Borough of Stratford (R. 95).[3]

By 1960, Haddonfield National also desired to establish facilities physically within Delaware Township at a pro-

[2] Delaware Township, an area of approximately 25 square miles with a present population of 32,000, now enjoys the services of 12 existing banking offices. The affidavit of Sylvan G. Fletcher (R. 84-87) shows graphically the number of banking facilities readily available and the proximity of Haddonfield National to appellant's branch in the Township and to the site of the proposed "new" bank.

[3] Pursuant to the New Jersey branch banking law, *supra*, p. 3, no New Jersey bank can establish a branch in an area where a national bank has already established a branch.

posed location approximately two miles from Haddonfield's main office and about one mile from petitioner's branch (R. 13, 84). Haddonfield National recognized that it could not establish a branch at the desired location because of the applicable statutes and unsuccessfully sought authority from the Comptroller, under 12 U.S.C. 30, to move its main office to the proposed location in Delaware Township while maintaining its present main office as a branch (R. 6).

Within a few weeks thereafter, an application was made to the Comptroller for the incorporation of a new national bank at the Delaware Township location (R. 7, 39). The nine individuals who signed the application were the nine directors of Haddonfield National (R. 7, 40). The application advised the Comptroller that "* * * under present New Jersey law additional branch offices cannot be opened * * *" but that a "* * * new bank can be organized within the Township * * *" (R. 39). The applicant's first choice for a title was "Haddonfield Suburban National Bank"; in the application the mailing address was that of Haddonfield National, with communications to be addressed to Horace G. Moeller, who is President of Haddonfield National (R. 39).

By letter of November 21, 1960, the Comptroller gave preliminary approval to this application, selecting as the title "Delaware Valley National Bank of Delaware Township", the applicant's second choice (R. 41). Shortly after receipt of this letter, the President of Haddonfield National, on December 8, 1960, sent a circular letter, under the Haddonfield National letterhead, to Haddonfield National's shareholders, urging them to subscribe for the shares of the "new" bank (R. 13-14). The letter stated, *inter alia*, that Haddonfield National could not establish a branch in Delaware Township because of the branch banking law but that the Haddonfield National Board of Directors, as "individuals", had obtained preliminary ap-

proval from the Comptroller to establish a "new bank". The letter further stated that the "new" bank would be an "* * * affiliate of the Haddonfield National Bank and that its affairs would be conducted by the same management and under the same policies as the Haddonfield National Bank". (R. 13).[4]

Upon learning of the Comptroller's preliminary approval, petitioner, on January 3, 1961, filed this suit for declaratory and injunctive relief, challenging the Comptroller's statutory authority to permit the "new" bank to commence the business of banking.[5] Petitioner contended that, as the result of the Comptroller's proposed action, Haddonfield National would, in substance, acquire a branch facility in Delaware Township in violation of 12 U.S.C. 36(c)(2), and that the Comptroller, in approving and proposing to issue a final certificate of authority on this application, was countenancing a plain attempt to evade the controlling statutory provisions of the National Bank Act. Both the National Association of Supervisors of State Banks and the State of New Jersey, appearing *amici curiae* (R. 19, 23, 24, 27), urged that the Comptroller should be enjoined from permitting evasion of the federal and state laws on branching by means of the "new" bank device.

In response, the Comptroller moved for summary judgment (R. 51). Stressing that the only material facts were the application for authorization, the Comptroller's preliminary approval, and the execution by the incorporators of the Articles of Association and Organization Certifi-

[4] The 1960 Annual Report of the Haddonfield National Bank contained language identical with that quoted above, under the heading "Delaware Valley National Bank". (R. 84-85).

[5] An application for a temporary restraining order was filed but not pressed in view of the Comptroller's agreement administratively to stay the issuance of a certificate of authority until the case was heard and decided.

cates,[6] the Comptroller took the position that 12 U.S.C. 36 (c)(2) was inapplicable and that he possessed power to consider and pass upon the application solely by reference to 12 U.S.C. 21-27, those sections of the National Bank Act which deal with the authorization of new banks. Stenographic Transcript of Proceedings in District Court, pp. 6-9. The argument emphasized the form of the application, the separate corporate entity and the absolute discretion of the Comptroller over new bank applications (Stenographic Transcript, pp. 10, 11, 16, 23), concluding that the Comptroller is the "* * * banking power for this nation, and it is his decision in the exercise of his judgment and discretion as to when this certificate of authority should issue * * *." Stenographic Transcript, p. 17.

To meet petitioner's uncontroverted factual showing as to the nature of the proposed new facility, the Comptroller argued that his authority under 12 U.S.C. 21-27 included absolute power knowingly to authorize the establishment of "affiliate" banks, stating that "* * * the approval of a bank which is an affiliate of another bank is certainly within the contemplation of the statute and the power of the Comptroller." Stenographic Transcript, pp. 14-15. Supporting the Comptroller, intervenor stated that "* * * from the start the intention here has been to form an affiliate * * *". Stenographic Transcript, p. 31.[7a]

[6] Subsequent to the filing of this suit, the incorporators, on January 19, 1961, completed Articles of Association and an Organization Certificate (R. 53-61). The incorporators, the entire board of directors of Haddonfield National, became the directors of the "new" bank (R. 53). Thereafter, these papers, together with other proceedings, were forwarded to the Comptroller who, on January 27, 1961, advised Mr. Moeller that the corporate existence of the "new" bank was now established but that, before a charter could issue, certain other steps had to be taken, the case then to have "further attention". (R. 44-46).

[7] The Comptroller did not "* * * act on this application as a branch bank application * * *", since it "* * * wasn't made to him in that manner." Stenographic Transcript, p. 26.

[7a] In addition, both the Comptroller and the intervenor advanced various jurisdictional arguments.

After hearing on cross motions for summary judgment on August 7, 1961, the district court, by an order, dated August 12, 1961, sustained the motions for summary judgment of the Comptroller and intervenor as "• • • a matter of law • • •" (R. 102). The conclusions of law (R. 106), prepared by the Comptroller and adopted by the district court, recited that the Comptroller had absolute discretion to approve the establishment of the intervenor under 12 U.S.C. 21-27 and that the provisions of 12 U.S.C. 76(*a*) were inapplicable to the case. The conclusions further stated that the intervenor, a body corporate, was an instrumentality of the federal government and that the "• • • fact of its affiliation with another banking association does not make it any less a body corporate." The conclusions also held that the Comptroller's discretion under 12 U.S.C. 21-27 was not subject to judicial review, that petitioner was "• • • without standing to challenge the Intervenor's corporate existence", and that petitioner was without standing to challenge the Comptroller's approval of the new bank.

In affirming, Judge Bastian dissenting, the court below stated that it did not discuss the district court's conclusion that petition was without standing. App., *infra*, p. 7a.[8] On the question of the Comptroller's statutory power and duty, the majority below noted that intervenor was a sep-

[8] In the court below, the Comptroller renewed his argument that petitioner lacked standing to challenge his authority to approve a branch or charter a bank, noting that he had unsuccessfully argued to the same effect in *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D.C.D.C., 1959), affirmed *per curiam* and petition for rehearing denied, 278 F. 2d 871 (C.A.D.C., 1960). The Comptroller's argument on lack of standing was also rejected in *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6, 1958), *certiorari denied*, 358 U.S. 830 (1958). Although standing was a principal question raised in the National Bank's petition for certiorari in *Wayne Oakland* (Oct. T., 1958, No. 216, Petition for Certiorari, pp. 25-29), no petition was filed on behalf of the Comptroller and the Solicitor General apparently advised this Court that he did not desire to file a brief stating the Comptroller's views. See Oct. T., 1958, No. 216, Brief in Opposition, p. 8.

The Comptroller has not argued that a court lacks power to pass on challenges to his statutory authority, although intervenor so argued in both courts below, basing its contention on decisions such as *Kennedy* v. *Gibson*, 8 Wall. 498 (1869), *Cases*

arate entity, and stated generally that "* * * what was done was within the authority conferred by existing statutes * * *". App., *infra*, p. 7a. The opinion stated that it was not within the court's "* * * province to pass on the desirability *vel non* of permitting a national bank to have an 'affiliate', as the appellant has here used the term * * *." App., *infra*, p. 7a. A petition for rehearing *in banc* was denied by the court below, Chief Judge Miller and Judge Bastian dissenting. App., *infra*, p. 11a.

REASONS FOR GRANTING THE WRIT

1. **Importance of the Question.** This case presents for decision the most important question of statutory construction to arise under the National Bank Act since this Court considered and decided *First National Bank* v. *Missouri*, 263 U.S. 640 (1924). The Comptroller of the Currency possesses only such authority to charter national banks or facilities as is conferred upon him by the National Bank Act. *Id.* at 656-657.

v. *Galt*, 94 U.S. 673 (1876) and *Adams* v. *Nagle*, 303 U.S. 532 (1938). In those cases, the Court refused to permit collateral attack in situations involving bank failures, the overriding consideration being the protection of creditors and depositors and the critical need for uninterrupted liquidation. 8 Wall. at 506; 303 U.S. at 540-541, 543; 94 U.S. at 679. Here, there clearly is jurisdiction to consider petitioner's charge that the Comptroller's proposed action is beyond his statutory powers. *Marbury* v. *Madison*, 1 Cranch 137, 165 (1803); *Harmon* v. *Brucker*, 355 U.S. 579, 581-582 (1958); *Board of Governors* v. *Agnew*, 329 U.S. 441 (1946).

In the district court, both the Comptroller and intervenor suggested that the completion of incorporation papers by intervenor on January 19, 1961 subsequent to the institution of suit and the administrative stay by the Comptroller and prior to the intervention served to rob petitioner of standing, with only the Attorney General empowered, by *quo warranto*, to challenge intervenor's status. Stenographic Transcript, pp. 7-8, 12, 74. Whatever intervenor's status, it could only commence the business of banking when it receives the Comptroller's certificate under 12 U.S.C. 27, *supra*, p. 2. It should be noted that, in *Wayne Oakland*, *supra*, the court of appeals rejected an argument by the Comptroller that his final certificate merely evidenced his prior approval.

2 One of the misapprehensions in the majority opinion below is that petitioner imported the term "affiliate" into this case. But see, *supra*, pp. 6, 7.

Two sections of the National Bank Act constitute the sole source of the Comptroller's power to create a national banking business or facility. 12 U.S.C. 27, *supra*, p. 2, authorizes the Comptroller to charter a new national bank if it appears on all the facts known to him, that the association "• • • is lawfully entitled to commence the business of banking. • • •". 12 U.S.C. 36 (c), *supra*, p. 2, authorizes him to approve the establishment of branches of national banks under carefully defined conditions. These sections, even if read separately, do not provide the requisite statutory authorization for the action of the Comptroller which the court below has approved. Read as part of an integrated statute, as they must be, these sections prohibit that action.

Petitioner's basic case presents a classic occasion for disregarding form—the "new" bank—and recognizing the substance of the transaction.[10] It was the duty of the Comptroller to recognize and reject the application as an attempted evasion of 12 U.S.C. 36 (c) (2) in the light of the clear language of the section and the forceful and affirmative Congressional policy embodied therein. See, *infra*, pp. 14-16.

The importance of the issue is magnified by the nature of the Comptroller's defense accepted by the court below. He has never stated, nor can he, that he viewed the proposed facility as a *bona fide* independent unit bank. Rather, he claimed, for the first time, an absolute statutory power knowingly to permit the establishment of "affiliates" and the right to exercise this power even though it results in the creation of a subordinate banking facility in circumstances where the establishment of a branch is clearly prohibited.

[10] The corporate privilege may never be invoked or urged for a purpose inconsistent with the policy of its creator. See, generally, 1 Fletcher, *Cyclopedia Corporations* (Permanent Edition), Section 45, 1960 Cum. Supp.; Stevens, *Corporations*, p. 96 (1949); Latin, *Corporations*, p. 75 (1959).

The reach of the Comptroller's claim of power is clear. After most elaborate consideration, Congress chose to put the national and state banking systems on a plane of absolute competitive equality in the matter of branch banking. Proposals that national banks be permitted to branch without reference to state law were rejected as destructive of the dual banking system. Where states permitted branching, national banks were not to be disadvantaged. Neither were they to have a competitive advantage. As the states opened up branching, national banks were accorded a precisely equal privilege, state by state. Since 1933, the administration of the delicate competitive relationship between national and state banks has been premised on this policy.

The Comptroller's position here, accepted by the court below, completely disregards this policy and frustrates the legislative objective. If that Congressional choice is now to be questioned,[11] the course to follow is to propose legislation, not to countenance the evasion of existing statutes by permitting devices such as that here involved. The power to choose is in Congress.

This case illustrates the point. Here, Haddonfield National has established branches wherever the statute permitted. Where it has done so, no state bank can come in. However, in Delaware Township, Haddonfield National

[11] On several recent occasions, the Comptroller has stated his dissatisfaction with the requirement that the privilege of national bank branching be measured by state law. He has described such laws as showing "* * * little regard for the public interest * * *, designed to protect selfish interests * * *" serving only "* * * the determined opposition of parochial interests". Excerpts from Comptroller's decision on merger of National Bank of Detroit and Bank of Livonia, reported in *The American Banker*, March 20, 1962. He went on to state: "For far too long the states have been in a position of impeding the National Banking System."

[12] The situation here parallels the 1920 situation in which the then Comptroller, impatient at his lack of authority to permit branching, sought to do so by the "outside agency" or "teller's window" device. The Court invalidated the device and Congress strongly condemned the Comptroller for acting without Congressional authority. *See infra*, pp. 13-14.

can come into territory already occupied by a state branch bank by means of the "affiliate" device. National banks thus gain an enormous competitive advantage. State banks will suffer or state legislatures be forced to adopt retaliatory policies, in an area where balanced and controlled competition has long been considered to be critical.

The need for review by this Court is clear. The question is important. The banking community is gravely concerned by the impact of the judgment below, which fixes the law, with virtually no consideration of the issue of statutory power, in the only jurisdiction in which the Comptroller is amenable to suit.

2. **The 1864 Statute.** The statutory provisions upon which both the court below and the Comptroller rely (12 U.S.C. 21-24, 26-27) derive from the National Bank Acts of 1863 and 1864, the statutes by which Congress re-established a national banking system.[13] The national bank which Congress thus empowered the Comptroller to create was to be an independent unit bank, locally complete and independent, conducting its usual business from within the four walls of its banking house. See 29 *Op. Atty. Gen.* 81 (1911). The rigorous nature of this concept as to the Comptroller's authority and a national bank's power was continuously emphasized. For example, this Court, in *Concord First National Bank* v. *Hawkins*, 174 U.S. 364 (1899), held that a national bank possessed neither the express nor necessarily implied power to acquire the shares of another national bank, stating (p. 369): "The smaller banks, in such a case, would be in fact, though not in form, branches of the large one."

The concept of a national bank as an independent unit

[13] The Act of June 3, 1864, 13 Stat. 99, was incorporated into the Revised Statutes and thence into the code. See 12 U.S.C. 38, note. Insofar as here material, these statutory provisions have not been changed since their original enactment in 1864.

bank was the basis of this Court's decision in *First National Bank v. Missouri*, 263 U.S. 640 (1924). The Comptroller had repeatedly urged Congress to permit him to authorize branches. *Infra*, pp. 14-15. Without authority, the Comptroller undertook to permit the establishment of outside "agencies" or "additional offices" to perform ministerial duties of a routine nature. The validity of such "outside offices" was the issue before the Court in the *First National Bank* case. The Solicitor General, in argument, conceded that, for over fifty years, it had been the continuous executive and Congressional view that the "usual business" of a national bank must be transacted "in a single and well-defined banking building." 263 U.S. at p. 648. But he urged that "modern banking practice" required changing the "narrow and literal" construction of the statutory "usual business" phrase, at least to the extent of validating these "outside offices." 263 U.S. at 649-650. This Court rejected the argument. After analyzing the statute, and noting with approval the consistent executive and Congressional construction of its provisions, the Court held that no power to establish outside offices could be implied as "* * * necessary to carry on the business of banking." 263 U.S. at 657-659.

The "outside office" or "teller's window" notion had, in fact, been used as a device, with the sanction of the Comptroller, to establish more than 439 branches between 1918 and 1926, a fact made known to Congress when it considered the McFadden legislation to permit limited branching.[14] 68 Cong. Rec. 3822. That action was condemned. It was noted that a national bank cannot do anything "* * * not specifically permitted in the national banking act * * *"

[14] The McFadden Act of 1927 authorized the establishment of "inside" branches by national banks within the limits of the city, town or village in which the bank was situated "* * * if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question * * *." 44 Stat. 1228, 12 U.S.C. 36(c)(1).

and that this device for evading the prohibition against branch banking had been "* * * foisted upon various communities by the lack of enforcement of the banking act by the Comptroller of the Currency. * * *" 68 Cong. Rec. 3822. The approval by the Comptroller of these "branch offices" was described as "an "* * * illustration of bureaucracy legislating instead of Congress legislating." 68 Cong. Rec. 3823.

The basic concept of the national banking system—a system of unit independent banks—was adhered to and reaffirmed by Congress in the course of considering the branch banking legislation of 1927 and 1933. Carefully defined branching power was added to equalize the competitive position of national banks with state banks. Beyond this, there was no departure from the strong Congressional feeling that the system of unit independent banks was the "distinctive achievement" of the banking system of the United States and must be maintained. 68 Cong. Rec. 3826.[15]

3. **The 1933 Branching Legislation.** The enactment in 1933 of the branch banking provisions of the Glass-Steagall Act (12 U.S.C. 36(c)(2)) was preceded by many years of concern on the part of the Comptroller of the Currency over his lack of authority to put national banks on a competitive parity with state banks by the authorization of branches.[16]

---

[15] See 68 Cong. Rec. 2166, 2169, 2171, 2172, 2173, 2174, 2175, 2176, 2178, 2180, 2182, 2184, 2188, 3652. See also 37 Op. Atty. Gen., *supra*, at p. 329; S. Rep. 584, 72d Cong., 1st Sess. (Minority Views), pp. 1-4; 75 Cong. Rec. 1416, 2141, 9975, 9980.

[16] In the first two decades of this century, state banks engaged extensively in branch banking in those states where branching was permitted. Board of Governors, Federal Reserve System, *Banking Studies* (1941 Ed.), p. 118. State law with regard to branch banking has developed steadily since the 1920's. As of 1927, only 8 states permitted state-wide branching and 9 permitted city and county branching. As of today 17 states permit state-wide branching, 19 permit branching within limited areas, 12 prohibit branching and 2 have no legislation on the subject. Thus, as the states have opened up branch banking, the privilege of branching has become available to national banks pursuant to 12 U.S.C. 36(c).

See, *e.g.*, Annual Report of Comptroller of the Currency, 1895; *ibid* 1896, pp. 103-105; *ibid* 1902, pp. 45-57. Beginning in 1915, the Comptroller recommended annually that he be empowered to authorize branching. See, *e.g.*, Annual Report of Comptroller, 1915, pp. 33-34; *ibid*, 1923, pp. 2-17; *ibid*, 1924, p. 5; *ibid*, 1929, p. 5. The position of the Comptroller's office by 1930 was that outside branching should be permitted on a "trade area" basis, not measured by state branching laws. *Hearing Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking* (1930), 71st Cong., 2nd Sess., Vol. 1, pp. 6, 9, 15-18, 23, 27, 66-67, see also, Annual Report of Comptroller, 1931, p. 1.

By 1932, the economic realities of the banking crisis tempered the consistent refusal of Congress to permit national banks to branch. The reports accompanying the Glass-Steagall Bill recognized that the "* * * banking system is going through a period of great change * * *" and that, therefore, "* * * provision for branch banking powers under carefully qualified conditions with a view to making a larger experiment with branch banking is deemed essential * * *" S. Rep. 77, 73d Cong., 1st Sess., p. 11. The "carefully qualified conditions", embodied in the language of the statute, reflect a basic and sharply debated choice by Congress. S. 4412, as originally introduced by Senator Glass (reported out on May 6, 1932, 75 Cong. Rec. 9711) would have authorized state-wide branching without regard to state law. This proposal was seen as threatening the existence of the dual banking system and was bitterly opposed. S. Rep. 584, 72d Cong., 1st Sess., Part II (minority views), pp. 1, 4-5 (1932); 75 Cong. Rec. 9890, 13002; 76 Cong. Rec. 4449, 1997, 2079, 2080, 2090, 2205, 2206. Accordingly, the bill passed only the Senate after being amended to embody a forceful and affirmative Congres-

[12] See, *infra*, pp. 16-18.

sional policy of establishment of precise competitive equality between the national and state banking systems—national banks were to be permitted to branch only in those states where state banks were given this privilege and under precisely the same terms and conditions. S. 4412, as thus amended, was reintroduced in the 73d Congress, and enacted with the language embodying the policy of precise equality further strengthened. 77 Cong. Rec. 3726; S. Rep. 77, *supra*, p. 11. And see 37 Op. Atty. Gen. 325 (1933). As enacted, the Comptroller is authorized to permit outside branches, only where such branches would be permitted to a state bank "* * * by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition * * *". 12 U.S.C. 36 (c)(2).

4. **"Affiliate" Banks.** The Comptroller's argument that he has absolute statutory power knowingly to authorize an "affiliate" under 12 U.S.C. 27, implicitly accepted by the court below, is based on the existence of forms of multiple banking known as "chain" or "group" banking.[18] Chain and group banking exist but developed, not as the result of

[18] In chain banking, each bank in the chain is a separate corporate entity with its own directors "* * * operated quite independently of all the others in the chain * * *" but centrally owned. Cartinhour, *Branch, Group and Chain Banking* (1931), p. 59. "* * * In a typical chain system, usually an individual or a group of individuals owns and controls two or more unit banks * * *." Chapman and Westerfield, *Branch Banking* (1942), p. 319. The descriptive words "chain" or "group" serve to indicate whether ownership is in individuals or corporations.

"Affiliate" is not a word of art. Rather, the term is descriptive of a variety of relationships. For example, "affiliation" may exist between chain banks, group banks, national and state banks, banks and non-banking enterprises. See, *e.g.*, 12 U.S.C. 221a. The term acquires content from the context in which it is used. Here, "affiliate" is used to describe the relationship to Haddonfield National of a proposed subordinate facility—organized in corporate form because the establishment of a branch was prohibited and which would otherwise never come into existence—to be operated under common management and control in territory already served by Haddonfield.

It has been suggested that the term "affiliate" comes into use in banking matters whenever the keynote is evasion. 74 Cong. Rec. 9904.

official authorization by banking officials such as the Comptroller, but as the result of uncontrolled private activity. Congress has viewed resort to these forms of banking as an evil and has sought, to the extent deemed possible, to impose measures of control. These control measures neither create nor recognize in the Comptroller the power he here claims.

The law of most states in the 1920's, like the National Bank Act, authorized only the creation of unit banks. *Branch, Group and Chain Banking*, 48 Harv. L.R. 659, 660-661. The states also forbade the direct acquisition of the stock of one bank by another. 48 Harv. L.R. at p. 663. Cf. *Concord First National Bank v. Hawkins*, *supra*. At the same time, there was a powerful trend toward concentration of control in banking, as in other fields.[18a]

A way to realize this drive was found in the fact that there was no control on the right to form a chain through stock purchase or acquisition, or some other form of private activity. 48 Harv. L. R. at 663; Hearings, *supra*, Vol. I, pp. 221, 223. The chains thus formed could be interstate or intrastate in nature, combining national and state banks under common control, and embracing non-banking enterprises being insulated from scrutiny by the "almost insurmountable difficulty" of examining the chain as a whole. 48 Harv. L. R. at 663; Chapman, *Concentration of Banking* (1934), p. 741; Westerfield, *The Banking Act of 1933*, 41 J. Pol. Econ. 721, 744 (1933); Hearings, *supra*, Vol. 1, pp. 6, 27, 32, 221, 243; 31 Colum. L. R. at pp. 976-977.

As the banking crisis developed, Congress gave close study to this whole development, conducting the extensive

[18a] *Hearing Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking* (1930), 71st Cong. 2d Sess., Vol. 1, pp. 22-23; Vol. 2, part 2, p. 1537; 48 Harv. L.R. at 663; *Branch Banks as Separate Entities*, 31 Colum. L. Rev. 975, 976-977 (1931).

hearings referred to above. The then Comptroller of the Currency testified that the federal government could not regulate chain bank systems directly and that states were unable to cope with the problem—a situation he described as "unwholesome". *Hearings, supra*, Vol. 1, pp. 6, 15-18, 27, 66-69, 221, 223. The Comptroller's testimony assumed that chain or group banking came into existence by uncontrolled acquisition or investment, not as the result of authorization by federal or state banking officials, and that he had no jurisdiction over chain banks. *Hearings, supra*, Vol. 1, pp. 6, 26-27, 32-33, 68-69, 221, 223.

The Glass-Steagall legislation—which provided for branch banking, *supra*, pp. 14-16—dealt separately with the evils in the banking system created by the growth of chain and affiliate systems. The whole growth of "bank affiliates" was described as "• • • situation never contemplated by the national banking act • • •." S. Rep. 584, 72d Cong., 1st Sess., p. 9; S. Rep. 77, 73d Cong., 1st Sess., p. 10. The report stated that the power to abolish "affiliates" was doubtful. S. Rep. 584, *supra*, p. 10. The report pointed out that group banking was similar to the "affiliate" system, stressing that the "• • • evils of indirect control are similar in the two cases • • •. The difficulty of eliminating or abolishing them in any effective way is similar to the difficulty of eliminating or abolishing the affiliates of city banks. • • •." S. Rep. 584, *supra*, p. 10. The report then states that a major objective of the legislation was to "• • • separate as far as possible national and member banks from affiliates of all kinds." S. Rep. 584, *supra*, p. 10.

Congress, accordingly in the 1933 legislation went as far as it deemed legally and practically possible. Various controls were imposed by way of conditions on federal reserve membership and F.D.C. coverage. 12 U.S.C. 161, 371(c).

377, 481.[19] The legislation thus enacted was designed to control an existing evil and in no way supports a claim by the Comptroller of Congressional approval, or recognition in him, of a statutory power to create affiliated banks.[20]

[19] By the time of the passage of The Bank Holding Company Act of 1956, the control measures enacted in 1933 were viewed as "entirely inadequate" to deal with the "unrestricted ability" of a bank holding company to add to the number of its units and to combine under single control both banking and non-banking enterprises. S. Rep. 1095, 84 Cong. 2d Sess., U.S. 1956 Code Congressional and Administrative Service, p. 2483. The 1956 legislation deals again, with the *acquisition* of, or *merger* or *consolidation* with, existing banks. 12 U.S.C. 1841(a) (c); 12 U.S.C. 1842. The legislation has nothing to do with the power of the Comptroller to create national banking facilities.

Some reference has been made in this case to the rejection by Congress, in connection with the 1956 legislation, of a proposal that holding company control be measured by state laws on branch banking. In rejecting this proposal, Governor Robertson of the Federal Reserve Board stressed that uniformity was the overriding consideration in determining Congressional choice of a method of implementing federal policy against concentration of control. *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency*, on S. 880, S. 2380 and H.R. 6227, 84th Cong., 1st Sess., p. 48. The inapplicability of state branching laws for achieving uniform federal control is obvious. The purpose of Congress in the 1933 branching legislation, was precisely the opposite. There Congress deliberately equated the privilege of national bank branching to state-branch banking, so as to ensure equality of competition on a state by state basis, with the states having the lead in widening the area of branching. *Supra*, pp. 15-16.

[20] The same conclusion is dictated by Congressional condemnation of the use of affiliate banks for the evasion of branch banking laws. Senator Glass, the prime sponsor of the legislation, stated that "* * * affiliates and the holding companies are acquiring long chains of banks * * * they are buying up banks * * *." 75 Cong. Rec. 9892. Senator Fletcher, another supporter, pointed out that national banks were evading the statutory restrictions on branching by organizing facilities and "those affiliates are doing exactly what a branch bank would do." 75 Cong. Rec. 9892. In response to Senator Fletcher, Senator Glass stated that a purpose of the legislation was to "* * * break up chain banking, which is an irresponsible species of banking and substitute for it branch banking, which is an entirely responsible species of banking." 75 Cong. Rec. 9893.

CONCLUSION.

The Comptroller of the Currency possesses only that authority to charter national banks or branches which has been conferred upon him by Congress. Under the 1864 provisions of the National Act, that power is limited to the establishment of *bona fide* independent unit banks. To this basic power, Congress has added the authority to approve the establishment of branch facilities under precisely defined conditions, not satisfied here. The effect of the decision below, sustaining the Comptroller's action in approving the application to establish an "affiliate", confers upon him an authority which Congress has not seen fit to grant and which must inevitably result in damage to the administration of the dual banking system.

Respectfully submitted,
BERNARD G. SEGAL,
SAMUEL D. SLADE,
Attorneys for Petitioner.

SCHNADER, HARRISON,
SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Pennsylvania.
Of Counsel.

March 31, 1962

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16575

CAMDEN TRUST COMPANY, APPELLANT,

v.

RAY M. GIDNEY, Comptroller of the Currency, et al.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Decided January 18, 1962

Mr. Samuel D. Slade for appellant. *Mr. Paul A. Sweeney* also entered an appearance for appellant.

Mr. John G. Laughlin, Jr., Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, and *Mr. David C. Acheson*, United States Attorney, were on the brief, for appellee Gidney.

Mr. Martin P. Snyder, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Mr. J. David Mann, Jr.*, was on the brief, for appellee Delaware Valley National Bank of Delaware Township. *Mr. J. Louis Monarch* also entered an appearance for appellee Delaware Valley National Bank of Delaware Township.

Mr. Lawrence J. Latto filed a brief on behalf of the State of New Jersey, as *amicus curiae*, urging reversal.

Mr. James F. Bell filed a brief on behalf of National Association of Supervisors of State Banks, as *amicus curiae*, urging reversal.

Before WASHINGTON, DANAHER and BASTIAN, *Circuit Judges*.

DANAHER, *Circuit Judge*: Appellant, Camden Trust Company, is a banking corporation organized under the law of New Jersey with its principal office in Camden and, since 1953, with a branch at Erlton in Delaware Township, New Jersey. Seeking declaratory and injunctive relief, appellant challenged the Comptroller's authority under pertinent provisions of the National Bank Act,[1] to issue a certificate of authority which would permit the intervenor, Delaware National Bank of Delaware Township, to commence the business of banking. The District Court granted summary judgment to the Comptroller and the intervenor and dismissed the complaint.[2]

On this appeal, appellant argues that under New Jersey's Banking Act of 1948,[3] no other state bank could establish a branch in Delaware Township. Accordingly it is urged that no national bank can establish a *branch*[4] at Elfisburg Circle in Delaware Township, only one mile from appel-

[1] 12 U.S.C. §§ 21-27 (1958), as amended, 12 U.S.C. §§ 24a, 24, 26 (Supp. II, 1960). Section 27 provides with respect to a "new" duly qualified banking association, that the Comptroller "shall" grant a certificate of authority, but "may withhold" a certificate "whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Chapter."

[2] The Comptroller, pendente lite, agreed to an administrative stay of issuance of a certificate of authority to the intervenor.

[3] N.J.S.A. 17:9A-1(2) so defines "banking institution" as to include a "national banking association," and 17:9A-19 provides in pertinent part:

"B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office.

* * * * * *

"(3) When each proposed branch will be established in a municipality in which no banking institution has its principal office or a branch office."

[4] Resolution of our issue turns on whether or not intervenor is a "branch." Of course, "there is no discretion in Comptroller to approve the establishment of a branch office at a location prohibited by law." Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770, 778 (D.D.C. 1959), *aff'd*, 108 U.S.App.D.C. 37, 278 F.2d 871 (1960). Appellant to fortify its contention points to 12 U.S.C. § 36 (1958) which reads in pertinent part:

[illegible]'s branch at Erlton. The Haddonfield National Bank, located in the adjacent Borough of Haddonfield, had sought in 1960 to locate its main office in Delaware Township while retaining as a branch its Haddonfield office only two miles from Ellisburg Circle. The Comptroller denied that application, correctly we think, for clearly the application related to a *branch*, not a "new" bank.

Shortly thereafter, eight of Haddonfield National's nine directors, later joined by the tenth, as individuals signed and filed an application for the incorporation of a new national bank at the Ellisburg Circle location. Appellant filed objections to the application and by appearance before the Comptroller vigorously protested. The Comptroller [illegible] Camden filed this action. Its complaint in the District Court alleged that the application of the Haddonfield directors was "on its face a pretext and a stratagem to circumvent the provisions and purposes of the National Bank Act by attempting to establish [illegible] Delaware Township a banking facility that will for all practical purposes constitute a branch facility of the Haddonfield National Bank." Issue of a Certificate of Authority to open a bank, it contends, is contrary to law, because the Comptroller's authority to approve ceases upon his disapproval.

Whatever weight is to be given to the appellant's legal argument, it is difficult to think of the Haddonfield [illegible]

[illegible] National banking [illegible] of the currency, establish and operate [illegible] city, town or village in which said [illegible] operation are at the time expressly authorized to [illegible] State in question, and [illegible] is situated, if such establishment and operation are at the time [illegible] Banks by the statute law of the [illegible] such authority affirmatively and not merely by implication or silence, and subject to the restrictions as to location imposed by the law of the State on State banks.

[illegible] National Bank of Detroit v. Wayne-Oakland Bank, [illegible] *denied*, 358 U. S. 830 (1958); Michigan National Bank-Lenawee, Mich. v. Andrews, 99 U. S. App. D. C. 134, 237 F. 2d 962, *cert. denied*, 352 U. S. 837 (1956); First Natl. Bank v. Missouri, 263 U. S. 640, 658, 659 (1924); [illegible] Franklin Nat. Bank v. New York, 347 U. S. 373, 378 n. 7 (1954).

tors' action as a "subterfuge,"[6] at least in an invidious sense. On the contrary, the preliminary proceedings seem to have been open and notorious. Perhaps on that account the "subterfuge" was alleged to be "manifest." The president of the Haddonfield National Bank on its letterhead notified all of its shareholders of the plan and the objective which the directors sought.[7] Appellant protested orally

[6] Subterfuge. "A device, plan, or the like, to which one resorts for escape of concealment; an artifice employed to escape censure or the force of an argument, or to justify opinions or conduct; an evasion." MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1959). Cf. Los Angeles Fisheries v. Crook, 47 F.2d 1031, 1035 (9 Cir. 1931).

[7] As an exhibit to appellant's complaint, the following letter, on the Bank's letterhead, was reproduced:

December 8, 1960

To the Shareholders of Haddonfield National Bank

On many occasions your Board of Directors and Officers have been invited by the residents and businessmen of Delaware Township to extend banking facilities to that area by the establishment of a branch office in that fast growing municipality. Under the New Jersey banking law, to which we are subject with regard to branches, it is not permissible for a bank, other than in its home community, to establish a branch office in a municipality where a banking office already exists. It is possible, however, to apply for a charter to start a new bank where the need, both present and future, would appear to exist. In line with that reasoning your Board of Directors as individuals, applied and have received from the Comptroller of the Currency, preliminary approval to establish a new bank to be known as the DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP, to be located in the Barclay Farm area.

The new bank proposes to issue 22,500 shares ($10 par) stock at $23.00 per share and the proceeds from the stock sale will be divided as follows:

Capital	$225,000.00
Surplus	225,000.00
Undivided Profits	67,500.00

It is expected that the DELAWARE VALLEY NATIONAL BANK will be an affiliate of the Haddonfield National Bank and that its affairs will be conducted by the same management and under the same policies as the Haddonfield National Bank.

The Board of Directors of the Haddonfield National Bank feels this is a very worthwhile undertaking and as shareholders you are invited to subscribe for shares in the new bank. Will you please indicate on the stub, which appears at the bottom of this letter, *whether or not* you are interested in purchasing shares in the new bank and to what extent. We would appreciate hearing from you within the next 10 days and a self-addressed postage paid envelope is enclosed for your convenience when replying.

Sincerely,

H. Moeller
President

and in writing to the Comptroller. The latter and the New Jersey Bank Commissioner[9] corresponded concerning the project. It fairly may be said that we perceive nothing arcane or wrongfully covert in the effort. The respectively zealous competitors really are at issue, we feel sure, solely as to whether or not the Comptroller in the circumstances shown is to be precluded by law from issuing a certificate of authority to the intervenor.

Thus viewed in its fundamentals, the case would seem to turn, not on the Comptroller's power but on its exercise. It is not claimed that the Comptroller may not charter a "new" bank. Rather it is urged, he must permit the creation only of a "bona fide independent national bank doing business within its four walls." For that narrow proposition appellant points to 12 U. S. C. § 36(c).[10] We read the section as saying that the Comptroller, affirmatively is empowered to authorize a national banking association to establish and operate new branches at, when and where state law permits state banks to do so.[11] The amendment subsequent to *First National Bank* v. *Missouri*, is clear on its face and says, without ambiguity, exactly what it means. Beyond peradventure, Congress even defined the term "branch."[12]

Appellant next would say, the intervenor will be "an affiliate" of the Haddonfield National Bank, referring to its exhibit, set forth in full in note 7. We read that language as an assurance to shareholders of Haddonfield that the trusted management of Haddonfield and the policies pursued in the past may justify investment in the shares of the new bank. The directors of Haddonfield

[9] The State of New Jersey, taking a position similar to that of the appellant, has been allowed to file a brief as amicus curiae. A like privilege was accorded to and accepted by the National Association of Supervisors of State Banks.

[10] *Supra* note 4, and of course to New Jersey law, *supra* note 5.

[11] Congress in § 36(c) did no more than "remedy the omission." See First Nat'l Bank v. Missouri, *supra* note 5, 263 U. S. at 659.

[12] 12 U. S. C. § 36(f) (1958). Even if it properly may be said that intervenor is an "affiliate" of Haddonfield, Congress has recognized a distinction between a "branch" and an "affiliate." See 12 U. S. C. §§ 221a, 377, 481 (1958); 12 U. S. C. §§ 161(c), 371c (Supp. II, 1960).

who as individuals were committing themselves and their capital sought information as to "whether or not" existing shareholders "are interested in purchasing shares in the new bank and to what extent." They were to be required to raise $517,500 "which would result in a legal loan limit of $50,000—the same as that of Camden Trust Company's branch at Erlton," the appellant tells us in its brief. We see nothing sinister in a banker's prudent inquiry as to just where the promoters were to stand.

There is nothing in the record to show that the shareholders formed the association "for any other than the legitimate objects" contemplated by the Act. The Haddonfield National Bank has not been shown to own the intervenor even if some of the stockholders and directors of the former should own some of the shares of the latter. The intervenor clearly is not a branch of Haddonfield but is a completely separate entity with certain distinguishing characteristics sufficiently so set up in the Government's brief as to justify our quoting verbatim:

> The capital structure of Delaware Valley is totally independent of that of Haddonfield National; the stock of Delaware Valley has been subscribed to and "paid in" as required by 12 U.S.C. 53; Delaware Valley stockholders are subjected to the individual liability described in 12 U.S.C. 63 [sic; repealed, 73 Stat. 457 (1959); see 12 U.S.C. § 64a], unrelated to their possible liability as shareholders in Haddonfield National; the Comptroller has assigned a name to Delaware Valley that is not susceptible of confusion with Haddonfield National; Delaware Valley will be located approximately two miles from the main office of Haddonfield National . . . the general business of banking to be conducted by Delaware Valley will "be transacted in the place specified in its organization certificate" (12 U.S.C. 81); deposits with Delaware Valley will be its liability not that of Haddonfield National; loan limitations on Delaware Valley will be those applicable to an independent bank, based on its own capital structure and totally independent of loan limitations applicable to Haddonfield National (12 U.S.C. 84); the limits of indebtedness which may be incurred by Delaware Valley will be as prescribed in 12 U.S.C.

82 and independent of similar limitations on Haddonfield National; the directors of Delaware Valley have been elected by its shareholders (12 U.S.C. 71), meet the citizenship, residence, and stock-ownership requirements specified in 12 U.S.C. 72, and: "If the directors • • • shall knowingly violate, or knowingly permit any of [the] officers, agents, or servants • • • to violate any of the provisions of [12 U.S.C. 21-214c], all the rights, privileges, and franchises of the association shall be thereby forfeited. • • •" 12 U.S.C. 93.

It is not within our province to pass upon the desirability *vel non* of permitting a national bank to have an "affiliate," as the appellant has here used the term. If such an affiliate is to be denied status, Congress must clearly say so. It is sufficient for our disposition of the present controversy to observe that what was done was within the authority conferred by existing statutes. Convinced, as we are, that 12 U.S.C. § 36 has no applicability to the situation disclosed on this record, we deem it unnecessary to consider other contentions urged upon us.[12] Accordingly, the judgment of the District Court is

Affirmed.

BASTIAN, *Circuit Judge*, dissenting: Congress, in 12 U.S.C. § 36(c)(2), provided:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: • • • (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

Under the banking laws of the State of New Jersey, a new branch bank may not be located in Delaware Town-

[12] We therefore do not discuss the District Court's conclusion that the appellant is without standing.

ship because there is a pre-existing banking office in that municipality. This is by virtue of the Banking Act of 1948 of the State of New Jersey (N.J.S.A. 17:9A-19), which provides in part as follows:

> "B. No bank or savings bank shall establish or maintain a branch office which is located outside the municipality in which it maintains its principal office; except that a bank or savings bank may establish and maintain a branch office or offices anywhere in the same county as that in which it maintains its principal office."

I think appellant is correct in its argument that:

> "The facts plainly show that the transaction here involved, in form an application for a 'new' bank charter, is, in substance a subterfuge to obtain a forbidden branch facility. These facts, fully known to the Comptroller, imposed a statutory duty on him to reject the application. This duty would follow the application of the familiar general principle that form will be disregarded whenever necessary to prevent evasion of the clear purpose of a statute. But the duty is made clear beyond question here by consideration of those statutory provisions from which alone the Comptroller derives his authority, the consistent interpretation of those provisions, and the strong and affirmative Congressional policy as to the nature of the Comptroller's authority.
>
> "A. The 1933 branch bank legislation was preceded by over a quarter of a century of concern by the Comptroller of the Currency as to his lack of authority to authorize branching by national banks and his repeated recommendations to Congress that he be given such authority. The Congressional history of the 1933 legislation makes plain that the Comptroller was only empowered to authorize national banks to establish branches on the basis of precise competitive equality with state banks. Accordingly, national banks could establish outside branches only in states where such branches were '* * * authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition * * *.' The debates which led to this

strictly circumscribed branching authority are outspoken in their condemnation of the use of chain or 'affiliate' banks as devices for evading branch banking restrictions or prohibitions.

"Thus, the only power added to the Comptroller's original authority to charter *bona fide* unit independent banks was the authority to permit branching as permitted by the statute law of the state in question, on a basis of precise equality with state banking systems."

While my colleagues take exception to appellant's use of the word "subterfuge," I think that one of the definitions quoted by them, namely "an evasion," covers the action of appellee like a glove.

The State of New Jersey, which has filed an *amicus* brief, contends, correctly I think, that "if an application for a new State banking charter were made under the same circumstances, it would be regarded in its substantive character as a branch application and rejected under the statute governing branch applications"; and that "[o]n the facts present in this case, the Delaware National Bank of Delaware Township should be held to be tantamount to a branch office of the Haddonfield National Bank, thereby bringing it within the scope and prohibition of 12 U.S.C. 36 (C) and Section 19 of the New Jersey Banking Act of 1948 (N.J.S.A. 17:9A-19)."

If substance rather than form is to prevail, the judgment of the District Court should be reversed.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that appelee Delaware Valley National Bank of Delaware Township recover from appellant its taxable costs on this appeal and have execution therefor.

PER CIRCUIT JUDGE DANAHER.

Dated: January 18, 1962

Separate dissenting opinion by Circuit Judge Bastian.

ORDER

There not being a majority of the circuit judges of this court in favor of a rehearing of the above-entitled case by the court *en banc*, the petition for rehearing *en banc* is hereby denied.

For the Court:
Chief Judge.

Dated: February 20, 1962

CHIEF JUDGE MILLER and CIRCUIT JUDGE BASTIAN would grant the petition for rehearing *en banc*.